Supreme Court, U.S.
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Record No. 97-609 JUL 17 1997

In The

Supreme Court of the United States

October Term, 1997

MARY E. HOWARD,
Petitioner,

v.

LAWRENCE D. GAUGHAN,
Respondent.

On Petition For A Writ of Certiorari

To The Circuit Court of Fairfax County, Virginia

PETITION FOR A WRIT OF CERTIORARI

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54 pp

QUESTIONS PRESENTED

I

A. When a party has requested a jury trial and that trial has commenced, if the Judge directs a verdict or strikes some, or all, of the party's evidence and/or claims, thereby taking consideration of those matters out of the hands of the jury, is that a violation of the party's Constitutional right to have the merits of his case decided by a jury?

B. Do statutes which give the Judge this authority deny the very protection which was sought by the party who specifically exercised his Constitutional right NOT to have a Judge decide his case?

II

A. Does the "case within a case" theory/doctrine discriminate against the Plaintiffs in legal malpractice actions by holding them to more difficult standards of review than would otherwise apply in similar actions where the Defendant is not an attorney?

B. Is the "case within a case" theory/doctrine so ambiguous that it creates confusion and lends itself to discriminatory rulings against the Plaintiffs in legal malpractice actions?

C. Does the "case within a case" theory/doctrine violate prohibitions against laws or legal requirements which are vague and overbroad?

D. In states where there are no statutes that differentiate treatment of legal malpractice actions from other actions which address the same issues (such as negligence or breach of contract), does it violate the Plaintiffs' right to due process, to equal protection of the laws and to fundamental fairness for the Plaintiff to be required to present a "case within a case"?

III

Has the State Court so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

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OPINIONS BELOW

The Judgment Order of the Fairfax County Circuit Court in Howard v. Gaughan was entered on May 24, 1996. (Appendix A) A timely Motion to Reconsider was denied. (Appendix B) As is briefly discussed on Pages 12-14, based upon the grounds that Mary Howard had not submitted the $25.00 filing fee, an allegation that she adamantly denied, the Supreme Court of Virginia dismissed her Petition for Appeal on September 12, 1996, without addressing its contents. (Appendix C) Her subsequent Motion to Reconsider was denied. (Appendix D) The Rule used to dismiss her Petition was immediately amended (Appendix E) after she contacted appropriate state legislators. On December 18, 1996, her Petition to Reinstate

was granted, the Order to dismiss was vacated, and the matter was placed on the docket of pending cases. (Appendix F) However, on March 4, 1997, her Petition for Appeal was again dismissed without consideration of its merits. This time the dismissal held she had failed to follow the Rule governing assignments of error. (Appendix G) Arguing that she had complied, her Petition for Rehearing/Reinstatement dissected the Rule, applying each sentence to her Petition for Appeal. It was denied on April 18, 1997. (Appendix H) Her Petition to Reinstate or to Clarify asked the Court to state exactly what was not in accordance with the Rule. On May 21, 1997, it was denied without comment. (Appendix I)

JURISDICTION

The Supreme Court of Virginia denied Mary Howard's Petition for Rehearing/Reinstatement on April 18, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a). Also, 28 U.S.C. § 2403 (a) and (b) may apply.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions involved are set forth in Appendix J. They include the Seventh and Fourteenth Amendments to the Constitution of the United States and prohibitions against laws which are vague and overbroad. Also included are Sections 6, 7 and 11 of Article I (the Bill of Rights) of the Constitution of Virginia. Relevant statutes are § 8.01-378 of the Code of Virginia and Rule 50 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

THE UNDERLYING CASE

Mr. Gaughan, the Defendant in the legal malpractice suit

being appealed, represented Mary Howard in the dissolution of her twenty-five year marriage. A law school professor and an experienced attorney with an advanced degree, for many years he had taught domestic relations to law students while also conducting a private practice which was confined to that area. (When deposed, he testified he went to trial an average of once a month.)

The primary thrust of Mary Howard's allegations against Mr. Gaughan's representation of her was that at the 1989 bifurcated divorce trial he failed to utilize in **any** manner the vital documents obtained through Discovery from her husband, Dr. Howard. This material consisted of: the checks for Dr. Howard's business, personal, and retirement accounts, along with the corresponding bank statements and check registers; appointment books and log books reflecting work hours and income; records of business, personal, and retirement assets, loans and debts; business and personal tax records. All checks, registers, appointment books, log books, and loan records were in Dr. Howard's writing. Most were for the period from two years before the separation up to the divorce hearing, over two years after the separation.

The importance of these papers is far-reaching and cannot be overemphasized. Compiled into exhibits for the divorce trial, they clearly and irrefutably proved that, both at the trial and the pendente lite hearing which preceded it by one year, Dr. Howard, under oath, had grossly misrepresented his personal income and expenses, the income and expenses of his one-man professional corporation, his work hours, and his debts. Submitted to Dr. Howard's counsel in advance, the accuracy of the

exhibits was not denied. The amounts involved were in the tens of thousands of dollars.

For instance, the annual elective income Dr. Howard reported for the divorce did not take into account over $31,000.00 he had received in unsalaried benefits. He had falsely claimed large personal expenses. Contrary to his testimony, his canceled checks showed he had voluntarily paid an average of almost $6,000.00/month support during the first full year of separation. Instead of spending 40-60 hours/week with patients, as he had repeatedly testified, he was barely working 20 patient hours/week. In violation of the Separation Agreement, he had withdrawn $95,000.00 from the marital assets in his care. There are many, many other equally important examples, all of which had a serious impact on virtually every mandatory factor that the divorce Judge was required to consider.

The transcripts of the divorce proceedings show that Mr. Gaughan not only failed to bring ANY of this material to the attention of the Judge, he failed to ask pertinent questions relating to it. Although fully aware of the $95,000.00 withdrawn by Dr. Howard, Mr. Gaughan stipulated to an undocumented accounting of the marital estate, prepared by Dr. Howard's counsel, which did not take that or other important facts into account. He further stipulated to what he knew were incorrect values for the real estate, the tangible personal property and other assets, all of which greatly favored Dr. Howard. This was done without Mary Howard's knowledge or consent. He made no corrections and she was held to those values.

Dr. Howard presented his case first. Each party called an expert witness to evaluate his professional corporation.

On the second day of the trial, when Mr. Gaughan unexpectedly stated he had concluded Mary Howard's direct examination, her attempt to express her concern to the Judge was not allowed. All that remained was her cross examination. A lunch recess was called, at which time she informed Mr. Gaughan she realized that something was terribly wrong with his representation and the only way she knew to impart this to the Judge was to not return.

Mr. Gaughan told her this would be disastrous, but he did not mention that it would almost certainly result in the striking of her testimony and evidence. Although that is what occurred, the testimony of her witness was allowed to stand, as well as any evidence entered through the witness. AFTER striking her testimony and evidence, the Judge directed both attorneys to submit written closing arguments which stated, with specificity, what their clients wanted. Instead, Mr. Gaughan's requests were general in nature, except for asking the Court to maintain the status quo with regard to furnishings and to sell the real estate (including Mary Howard's home, which he knew she wanted to keep.)

The Divorce Decree, which was not forthcoming until several months after the trial, set spousal support at $1.00/month. Based upon guidelines and the income claimed by Dr. Howard, $738.00/month was granted for child support. The Judge ruled that Dr. Howard's accounting of pension/retirement plans and other liquid assets was to be equally divided, in accordance with the stipulated values. The real estate and the tangible personal property itemized in the list prepared by Dr. Howard's counsel were ordered sold, with proceeds equally divided. Mary Howard was awarded half of the $49,500.00 value placed on

Dr. Howard's practice by his expert.

Although Mr. Gaughan was aware that the mortgage and condo fees for the jointly owned condominium where Mary Howard and the eleven year old son in her custody lived were in excess of $1,700.00/month and that she had no income other than the court-ordered support of $739.00/month, he did not ask the Judge to hold Dr. Howard financially responsible until the provisions of the Divorce Decree were implemented or to set a time limit for the implementation. Immediately, she was plunged deep into debt.

An appeal asking for a new trial on all issues was timely filed. The Virginia Court of Appeals remanded the support but affirmed the equitable distribution because there had been no objections.

AFTERMATH

At the time of the divorce, Mary Howard, who had dropped out of college to help Dr. Howard through dental school, was fifty years old. She had no college degree, no marketable job skills, and had not worked outside of the home in over twenty-five years.

Dr. Howard refused to voluntarily contribute to the jointly owned condominium until it could be sold, and the Circuit Court held that it could make no rulings while the case was under appeal. To avoid losing her home during the appellate process, just hours before the scheduled foreclosure auction Mary Howard was forced to file a Chapter 11 Petition with the U. S. Bankruptcy Court.

Due to what she contends were circumstances flowing directly from Mr. Gaughan's representation, the sizable marital estate was almost completely depleted by inordinate

and very costly delays in executing the terms of the Divorce Decree. When combined with her low income, high expenses, and escalating legal fees, the resultant financial damage was devastating and permanent. It was accompanied by severe, long-term hardships and personal deprivations including, but not limited to, years without basic necessities such as heat, air-conditioning, a car, health insurance, medical and dental care, etc. All are well documented. Unable to afford legal counsel for the almost continuous, increasingly complex, litigation arising from the divorce and her Chapter 11, Mary Howard, with the guidance of many kind attorneys, began representing herself in 1990.

THE MALPRACTICE TRIAL

The jury trial was held on April 16, 17, 18, and the morning of April 22, 1996. Immediately after the divorce trial the unused exhibits had been deposited into the Howard v. Howard file, which was present in the courtroom for Howard v. Gaughan. Copies of the same Discovery material contained in the exhibits, along with Dr. Howard's Affidavit as to its validity, had been turned over to the Court by his attorney and were also in the files.

Individual copies of the aforementioned exhibits were distributed to the jurors, and Mary Howard reviewed them, page by page, explaining the contents and purpose of each one. She testified as to how Mr. Gaughan had failed to use them, or their individual parts, at the divorce trial and, when appropriate, she read his statements directly from the transcripts. She described a number of occasions when Mr. Gaughan had misrepresented important matters to her and/or to the Judge. She discussed how, without her

knowledge or consent, he had stipulated to what he knew were wrong values for real estate, pension plans and other assets and how those stipulations were to her great financial detriment.

She used transcripts to demonstrate how Mr. Gaughan had asked questions in a manner that prevented the Judge from knowing the dollar amounts or values that were involved. She testified that he had refused to question Dr. Howard's expert witness for the practice evaluation about the fact that he and Dr. Howard were old personal friends who, for many years, had attended boxing matches together - and that the Judge had accepted the much lower (and, she alleged, biased) figure of Dr. Howard's expert over her expert's findings - a difference of $50,000.00.

She showed the jury the three-page list of expensive and irreplaceable marital antiques and furnishings in Dr. Howard's possession that had been improperly omitted as part of the marital estate and testified that she had submitted it to Mr. Gaughan before the divorce trial, but that he never brought it to the Judge's attention. She disputed the reply to her Motion for Judgment, in which counsel for Mr. Gaughan alleged she had contributed to the low support by not returning after Mr. Gaughan had concluded his case-in-chief.

Following Mary Howard's testimony, she called two attorneys as her expert witnesses. There were no objections to their expertise. Daniel Grove, Esquire, a partner in the law firm of Keck, Mahin & Cate, was qualified by the Judge to testify as an expert on the standard of care and on damages in the area of domestic relations. Sherman Cohn, Esquire, a Professor of Law and teacher

of civil procedure and legal ethics at the Georgetown University Law Center, was qualified by the Judge to testify as an expert on the standard of care.

The two experts testified that they had read the transcripts of the divorce trial, the transcripts of the depositions and the transcripts of the pre-trial and post-trial hearings up through the time Mr. Gaughan was discharged, shortly after the divorce. They also had examined the exhibits and had read the written closing arguments by attorneys for both parties, plus all motions and orders.

Mr. Grove reviewed for the jury the mandatory factors that the Judge must consider before awarding support and distributing the marital assets. Using specific examples, Mr. Grove and Professor Cohn testified as to how Mr. Gaughan should have, and could have, prepared the exhibits and gotten the Discovery documents into evidence. They explained these were crucial and how they impacted directly on Dr. Howard's credibility, on the values attributed to pension/retirement plans and other major holdings, on the child and spousal support, on the distribution of marital assets, and on the dental practice evaluation - EVERY area of the divorce. They confirmed that the Defendant did not use ANY of them to support Mary Howard's position or to rebut Dr. Howard's. Mr. Grove termed her case an "absolute disaster" up to the time she left. (4/18/96 p. 238, lines 17-19) He also faulted Mr. Gaughan for not making specific requests in his written closing argument.

The Judge had qualified Mr. Grove as an expert on both damages and the standard of care, but later changed his mind as to damages, accepting the argument by Mr. Gaughan's counsel that no one could possibly predict

what the divorce Judge would have done if all of the evidence on behalf of Mary Howard had been presented.

Out of the presence of the jury, Mr. Grove preserved his findings for the record by testifying as to what he believed Mary Howard should have been awarded if Mr. Gaughan had used the available evidence and if his conduct had been within the acceptable standard of care. (4/18/96 p. 312, line 5 - p. 318) Including the differential in support, her losses were close to $500,000.00. If combined with statutory interest and Mary Howard's other, documented, claims of direct and consequential damages, that figure is almost tripled.

According to the testimony of the two experts, Mr. Gaughan's representation of Mary Howard was below the standard of care with regard to his: depositions, Discovery, pretrial preparation; preparation of exhibits; presentation of exhibits; direct examinations; cross examinations; zealousness; handling of the personal property; handling of the real estate; handling of the pension plans; handling of the child and spousal support; handling of orders; and handling of the Commissioner's Report on the dissolution of the marriage. There were examples for each category. The April 18, 1996 transcript also contains Professor Cohn's testimony (pp. 259-305) and Mr. Grove's testimony for the jury (pp. 97-188, 223-246)

There is no dispute over the fact that the Judge required Mary Howard to present a "case within a case." Counsel for Mr. Gaughan repeatedly invoked this phrase to support his arguments, most of which were sustained. These arguments centered on the interpretation of that theory and its application to a myriad of issues including:

physical evidence; Mary Howard's testimony and that of her experts; the burden of proof; culpability; damages; and which matters should be decided by the jury. Citing statutes and case law, Mary Howard's objections were clearly made, orally and in writing. Federal issues were raised at the trial and in her Petition for Appeal to the Supreme Court of Virginia. (Appendix K)

On the morning of the fourth day, the Judge heard counsel for Mr. Gaughan argue his Memorandum of April 18th, in which he held that in cases which involve issues of both fact and law (such as Howard v. Gaughan), it is the ultimate speculation for "anyone" to try to second-guess what the Judge in the underlying case would have done "but for" the alleged negligence. He supported this with an attached transcript from a recent legal malpractice proceeding wherein the Chief Justice of the same Circuit Court had expressed the same opinion. The transcript referred to still another, similar, incident involving a legal malpractice suit in that Court.

Mary Howard then argued her written Motion Re Evidence and Damages. It responded to the aforementioned Memorandum and also addressed her objections to a variety of the Judge's rulings which she maintained were in direct conflict with the appropriate statutes and case law. She insisted that legal malpractice constitutes negligence or a breach of contract and should be treated accordingly, not governed by the discriminatory and ambiguous "case within a case" theory. Also, she objected to the Judge disallowing proper evidence and striking claims that were clearly in the province of the jury.

After listening to both parties, the Judge struck Mary

Howard's claim for mental anguish on the grounds that reasonable persons would not differ with his conclusion that there was no showing of a reckless disregard for her rights or an intent to harm. Although he ruled that there was a prima facie showing of a breach of the standard of care and that evidence for the malpractice was sufficient to go to the jury, he struck all of her remaining evidence and claims, finding that she had failed to show that, but for Mr. Gaughan's breach, the outcome of the case would have been different.

Notice of Appeal and a Petition for Appeal were timely submitted, as was the subsequent Opposition to Petition for Appeal from Mr. Gaughan's counsel.

DISMISSAL OF PETITION FOR APPEAL BY SUPREME COURT OF VIRGINIA

After Mr. Gaughan's counsel had submitted his Opposition to Mary Howard's Petition, the parties received notice that her Petition had been dismissed on the grounds that she had not paid the $25.00 filing fee and, therefore, had not complied with Rule 5:17(f) of the Supreme Court of Virginia. (Appendix C) She absolutely denied this in her immediate telephone call to the Clerk of that Court and in her subsequent, unopposed, Motion to Reconsider, which contained her Affidavit that she had enclosed her $25.00 check for the fee with her Petition. The Clerk conceded he could not disprove her Affidavit or disprove her contention that her check had been lost/misplaced by his Office. He also admitted that his Office routinely notified some, but not all, parties of minor defects and allowed them to make corrections. Nevertheless, on November 1, 1996 her Motion was denied. (Appendix D)

After contacting state legislators and challenging both the Rule and the manner in which it was being applied, steps were quickly taken to amend it and its counterpart in the Virginia Court of Appeals. The Amendment, passed without opposition, now allows ten days from the filing date for payment of the filing fee, thereby giving all Petitioners time to respond to/cure an alleged defect. (Appendix E)

On December 18, 1996, Mary Howard's Petition to Reinstate was granted, the Order of September 12, 1996 was vacated, and the matter was placed on the docket of pending cases. (Appendix F) However, on March 4, 1997, her Petition for Appeal was again dismissed without addressing its merits. This time, the Supreme Court of Virginia stated that it did not contain assignments of error as required by Rule 5:17(c). (Appendix G) In her Petition for Rehearing, she literally dissected the Rule and applied each sentence to her Petition to show that she had complied. With specific references to the appropriate transcripts, she disproved a number of misstatements in the Respondent's Opposition to her Petition, in case they had somehow influenced the Court's dismissal. Citing Stewart v. Hall, 770 F2d 1257 (4th Cir. 1985), a legal malpractice case, she pointed out that the appellate court had remanded Stewart because it had been tried on the wrong theory, although there had been NO prior objection to that effect in the underlying court action and although it had NOT been claimed as an assignment of error. The appellate court had held that even defects of that magnitude were deemed less important than fundamental justice. (The victorious appellant was the Defendant attorney.) She argued it would be a much greater injustice than Stewart if the Court did not

consider the merits of her Petition because, unlike Stewart, she had made objections and assigned errors. She emphasized that her Petition addressed the denial of her Constitutional rights to due process and to a jury trial.

On April 18, 1997, Mary Howard's Petition for Rehearing was denied, with no comment. (Appendix H) Her subsequent Petition to Reinstate or to Clarify was denied without comment on May 21, 1997. (Appendix I) Questions and Assignments of Error from her Petition for Appeal to the Supreme Court of Virginia are repeated in Appendix K.

REASONS FOR GRANTING THE WRIT (STATED BELOW EACH QUESTION)

QUESTION 1 - STRIKING OF EVIDENCE AND CLAIMS

The Writ should be granted because this Question impacts on all litigants who depend upon their Constitutional right to have the merits of their cases decided by a group of their peers rather than by a Judge.

The Seventh Amendment of the Constitution of the United States and Article 1, Section II of the Constitution of Virginia provide the right to a trial by jury in civil suits. Mary Howard argues that, once a jury trial has commenced, if the Judge strikes the evidence or claims or directs the verdict, thereby taking the case, or part of the case, out of the hands of the jury, he has desecrated the Constitutional right of the party who has expressly exercised his choice NOT to have a Judge decide the merits of his case: the very protection that the right to a trial by jury was intended to ensure has been violated.

The Code of Virginia, § 8.01-378, authorizes the Judge in a jury trial to strike the evidence and direct a verdict in conformity with his ruling. This is a common state law

analog of a motion for a directed verdict pursuant to Rule 50 of the Federal Rules of Civil Procedure. Mary Howard maintains that they conflict with Constitutional rights to have the merits of one's case decided by a jury.

The firmly established caveat for striking evidence and directing verdicts is that the Judge must view the evidence and all reasonable inferences arising therefrom in the light most favorable to the non-moving party and must conclude that there are no controverted issues of fact upon which reasonable men would differ.

As is patently clear in Howard v. Gaughan, such restrictions are totally inadequate safeguards against discrimination and other abuses by the Courts. They do not justify rules or statutes that infringe on the Constitutional right to a jury trial and they do not preserve the integrity of that right against such infringements.

Over three-and-a-half days, the jury reviewed Mary Howard's exhibits and listened to her testimony and to that of her two expert witnesses. On the morning of the fourth day, without the benefit of any testimony or rebuttal from the Defendant, the Judge struck all of her evidence and claims. The jury was quickly dismissed, before its members had discussed or addressed the case in any manner.

The Judge ruled that:

> "evidence for the malpractice claim was sufficient to go to the jury, as the expert testimony had established a prima facie showing there was a breach of the standard of care by Mr. Gaughan" (Order - Appendix A)

However, he then struck all evidence and claims except those for emotional distress, stating that Mary Howard,

> "...had failed to show that, but for the defendant's

breach, the outcome of the case would have been different." (Order - Appendix A)

It must be stressed that the latter conclusion was despite the expert testimony the Judge had accepted as sufficient prima facie evidence of malpractice. It was despite the potent Discovery evidence from the divorce which Mr. Gaughan had failed to use and which Mary Howard had distributed to the individual jurors and explained in detail: evidence upon which her experts based their opinions. It was despite the fact that much of that data, by its very nature, addressed the amounts of her losses. It was despite Mary Howard's extensive testimony in support of each of her allegations against Mr. Gaughan, although her credibility had never been questioned. It was despite documentation of those allegations and of her claims for damages. After three days of hard evidence in her favor, and with no evidence to the contrary, the Judge concluded that there were NO economic repercussions from the plethora of extremely serious breaches by Mr. Gaughan (although the breaches were irrefutably related to EVERY mandatory factor to be considered before awarding support or dividing the marital estate). Supposedly, he then concluded that no reasonable person would differ with this finding !

As discussed, Daniel Grove, Esquire, a partner in the law firm of Keck, Mahin and Cate, had been qualified by the Judge as an expert on the standard of care and on damages in the field of domestic relations. There had been no objections to his expertise or to that of Sherman Cohn, Esquire, a Professor of Law and teacher of civil procedure and legal ethics at the Georgetown University

Law Center, who had been qualified as an expert on the standard of care. Mr. Grove had reviewed for the jury all of the mandatory factors that must be considered in a divorce before awarding support and distributing the marital assets.

The experts verified Mary Howard's testimony with respect to her allegations against Mr. Gaughan and the claims in her Motion for Judgment. They testified, with examples, as to how Mr. Gaughan should have, and could have, gotten the evidence from Dr. Howard's Discovery into the record. They explained that it was crucial to her case and how it had a major impact on Dr. Howard's credibility, the values attributed to pension/retirement plans and other assets, the child and spousal support, the distribution of marital assets, and the evaluation of his practice - EVERY area of the divorce. (Custody of the son was the one uncontested issue.) They confirmed that Mr. Gaughan did not use ANY of the material to support Mary Howard's position or to rebut Dr. Howard's. As previously mentioned, Mr. Grove termed her case "an absolute disaster" up to the time she left. (4/18/96, p. 238, lines 17-19)

The experts agreed that Mr. Gaughan's representation of Mary Howard was below the standard of care with regard to: his pretrial preparation (depositions, Discovery); preparation of exhibits; presentations of exhibits; direct and cross examinations; handling of the personal property; handling of the real estate; handling of the pension/retirement plans; handling of the child and spousal support; handling of orders; and handling of the Commissioner's Report on the dissolution of the marriage.

Examples were referred to for each category. (Note 4/18/96 transcript: Mr. Grove, pp. 97-188, 223-246; Professor Cohn, pp. 259-305)

Mary Howard's claim for emotional distress was struck because,

> "On the claim for damages for emotional distress I am going to strike the evidence and sustain the Defendant's motion to strike that evidence. I don't think there's been any showing of any evidence on which reasonable persons could conclude that there was an intent to harm or that there was a reckless disregard for the Plaintiff's rights that would support a claim for either intentional or negligent infliction of emotional distress in this matter." (p. 2, lines 7-15 Excerpt of rulings at end of 8/22/96 transcript)

During the course of the trial, Mr. Gaughan's impressive credentials and background in the field of domestic relations were discussed, including the years he taught that subject to law students and the confinement of his practice to that field. It was brought out that, when deposed, he testified he went to trial an average of once a month and that his handling of Mary Howard's case was not the result of trial tactics gone awry. Considering Mr. Gaughan's numerous breaches in elementary areas of the law, the pervasive nature of his serious failures in EVERY area of his representation, Mary Howard's testimony about his deliberate misrepresentations to her and to the divorce Judge, and the fact that he took no corrective action (note "Statement of the Case"), it is all but inconceivable that someone with his experience was innocently negligent. At the very least, the evidence pointed to a reckless disregard of Mary Howard's rights. If reasonable men may differ, the jury is to determine whether the conduct should result in

liability. Wise v. GMC, 588 F. Supp. 1207 (W.D. Va. 1984)

Although it should have no bearing on the right to a jury trial, Mary Howard disputes the premise that it furthers judicial economy and curtails expenses of the litigants for a Judge to have authority to strike evidence and claims or direct a verdict during a trial where a jury has been requested. Instead, the workload of the courts and the costs to the parties stand to be substantially increased by the appellate process. The time and cost differential between a directed verdict or striking of evidence/claims and allowing a trial to go to completion, with a jury verdict, is brief when compared to the lengthy and expensive preparation already invested by the parties. It pales when compared to the demands of an appeal brought on by such action - and to a new trial if the appeal is granted.

Discovery procedures now allow the parties to be fully apprised in advance of all exhibits, all witnesses, what the witnesses will testify to, and the basis for their expected testimony. There are rarely any surprises. Dismissals and striking of evidence and/or claims should be strictly limited to pre-trial hearings. If, at the completion of his opposition's case, a party believes the evidence was insufficient to support or defend the allegations and/or claims, it should be up to that party to argue this to the jury and up to the jury to weigh the evidence from both sides and draw its own conclusions. To do otherwise deprives citizens of their fundamental right to a trial by jury and exposes them to abuses and discrimination such as Mary Howard experienced in Howard v. Gaughan.

QUESTION 2 - BIAS/"CASE WITHIN A CASE"

The Writ should be granted because this Question

challenges the innate bias of the "case within a case" theory/rule and the fact that it is so nebulous and open to different interpretations that it is being improperly used to bypass appropriate laws and principles and to hold legal malpractice Plaintiffs to higher standards of review. Almost everyone, at some point in his life, must rely upon an attorney. Any failure of the Courts to hold incompetent or dishonest lawyers accountable for their actions undermines the entire legal system and poses a very real and dangerous threat to all citizens.

The "case within a case" theory inherently discriminates against the Plaintiff in a legal malpractice suit. It unnecessarily complicates and extends the burden of proof far beyond that which is normally required in negligence/tort actions. Not only must the Plaintiff prove the basic elements of negligence, he must prove two cases in one proceeding. Often he is required to prove additional facts, such as the validity and collectibility of the underlying case. Unlike other professionals, attorneys who have acted in good faith are usually exonerated, despite the damage.

To understand the full impact of how the "case within a case" theory is being used to subvert proper laws and run roughshod over Constitutional rights, one only needs to read the arguments propounded by Mr. Gaughan's counsel in the lengthy Memorandum he submitted on the third day of the trial (4/18/96), to know they were accepted by the Judge, and to realize there is supporting case law.

Stressing that Mary Howard must prove, through "a case within a case," that the outcome of her divorce would have been different "but for" the alleged malpractice, he then, in effect, declares this is impossible to do. For example, on

Page I, he asserts,

> "It is pure speculation for ANY (emphasis added) individual, be they expert or not, to predict what a jury or a judge sitting without a jury would rule (sic) presented with questions of fact or mixed questions of law and fact." (as per the underlying divorce case in Howard v. Gaughan)

This is followed by supporting excerpts from the aforementioned (p. 11) attached transcript. At the bottom of Page 2, he states, re the Judge in Howard v. Gaughan,

> "As in the present case, it is the ultimate speculation for an expert or ANYONE (emphasis added) to render an opinion that Judge Hancock would have ruled in a certain manner if presented with certain evidence of a factual nature." ("Evidence of a factual nature" refers to that which Mr. Gaughan failed to present in the underlying divorce case and is the foundation of Mary Howard's claims of malpractice and damages.)

At the top of Page 3 of his Memorandum, counsel for Mr. Gaughan writes,

> "As to critiquing the quantity and quality of legal services rendered by the Defendant, Courts have generally not permitted such testimony in areas where the issues can realistically be considered matters of judgment and trial tactics."

It was brought to the Judge's attention that when Mr. Gaughan was deposed he acknowledged that the alleged failures were not due to trial tactics gone awry. Mary Howard's objections to this last argument were sustained and her two expert witnesses were permitted to testify as to the standard of care. Although the Judge later ruled that their testimony established a prima facie showing of the alleged malpractice, that finding was negated by his acceptance of the first two arguments.

Holding that Mary Howard must prove a "case within a

case," the Judge then rendered this impossible by agreeing with the principle that no one could know how, if at all, the divorce Judge's rulings would have differed if the malpractice had not occurred. Holding her to an accurate accounting of claims for damages, he prohibited her from doing so by concurring it was too speculative for "anyone" to gauge the financial consequences of Mr. Gaughan's actions, or lack thereof. Having thereby obstructed her ability to ascertain both the causation and the extent of damages, he proceeded to strike all of her evidence and claims on the grounds that she had failed to prove them.

With the exceptional strength of Mary Howard's case (note pp. 7 - 12), the Memorandum's skewed version of the "case within a case" theory was the ONLY means by which the Court could justify his finding that she had not proved her claims. Under that guise, the Judge denied Mary Howard the jury trial which she had requested for the sole purpose of **avoiding** such discrimination.

In Virginia, unlike medical malpractice, there are no statutes that indicate legal malpractice is to be handled in a manner other than prescribed by the laws which apply to the allegations and claims in the Motion for Judgment. It is well-settled that negligence actions against attorneys are to be governed by the same principles that apply to other negligence actions. Lyle, Siegel, etc. v. Tidewater Capital, 457 S.E.2d 28 (Va. 1995), citing Allied Productions v. Duesterdick, 232 S.E.2d 774, 445 (1977), which cites Staples' Ex'ors v. Staples, 7 S.E. 199, 203 (1888).

Though there is case law stating the Plaintiff must present a "case within a case," McClung v. Smith, 870 F.Supp. 1384 (E.D.Va. 1994), citing Stewart v. Hall, 770

F.2d 1270 (1985), it is without benefit of legislation. This seems to be in violation of the Constitution of Virginia, Article I, Section 6, (and possibly 7) which holds that citizens may not be bound by any law unless, for the public good, they or their elected representatives have assented to it. Furthermore, because the "case within a case" subjects the Plaintiff to a far more difficult burden of proof, these rulings conflict with the rulings that legal malpractice cases based upon negligence are to be controlled by the same standards as other negligence actions.

If, as has been held, legal malpractice actions are grounded in negligence or breach of contract and should be treated accordingly, why are there often additional burdens placed upon the Plaintiff through the "case within a case" theory? He must prove **two** cases. If the allegations involve an award to the Plaintiff, there is case law that he must not only prove the negligence, the damages, and the causation, he must also prove that the party in the underlying case could have paid the award. Or, conversely, if a claim involves a judgment against the Plaintiff, there is case law that he must have paid the judgment in order to recover it. This subjects him to a Catch-22 situation whereby he may not be able to afford to pay the judgment unless he is awarded the funds from the malpractice suit - yet he can't claim the loss because he hasn't made the payment.

Because attorneys must make tactical, and often quick, decisions based upon the circumstances, should they be treated differently from other professionals accused of malpractice, as some courts have ruled? Woodruff v. Tomlin, 423 F.Supp. 1284 (1976) If so, why are Defendant

physicians, veterinarians, dentists, etc. who work under similar conditions, not given the same advantages by the Courts when lawyers sue them in malpractice actions?

Created by attorneys for attorneys, the purported intent of the "case within a case" theory is to provide a means of establishing culpability and damages in legal malpractice actions. However, statutory provisions controlling the basic claims and allegations are adequate for that purpose and much less susceptible to confusion and abuse. In actuality, the theory sets Defendant attorneys apart from other Defendants in similar actions and accords the attorneys preferential treatment at the expense of public interest. Although the Constitution permits unequal treatment of certain groups, it prohibits this type of discrimination.

That Courts will strive to achieve fundamental fairness is a basic premise of the Constitution. Even the strictest interpretation of due process guarantees citizens the legal process that is specified by applicable Federal or State statutes. Furthermore, the laws are to be applied without prejudice. Mary Howard's Petition for Appeal to the Virginia Supreme Court gave examples of the Judge's pattern of escalating her burden of proof in accordance with her success in meeting his changing (and increasingly more difficult) versions of a "case within a case," as well as examples of his inconsistencies and irrational reversals.

However, all of this was eclipsed by the arguments in the Memorandum by Mr. Gaughan's counsel: arguments so preposterous that they very literally place Mr. Gaughan and other Defendant attorneys above the law. Rather than dwelling on the individual legal errors and abuses, this

Question focuses on the source of such rulings, the "case within a case."

Bias of Courts toward fellow members of the legal establishment is widely recognized. As acknowledged on Page 4 of the April 18, 1996 Memorandum by counsel for Mr. Gaughan, the relatively few instances where Plaintiffs in legal malpractice suits have prevailed are almost exclusively confined to those where the underlying case involves default, or where statutes of limitation have expired, or when there has been outright malfeasance involving money (i.e., simple cases, where the guilt and the amount of damages are all but proven in advance).

When, as with Howard v. Gaughan, the underlying action involves issues of both fact and law, or has already been tried, or is somewhat complex, the chances of a Plaintiff in a legal malpractice suit are greatly diminished. Mary Howard submits that this is due primarily to the use by the Courts of the "case within a case" theory.

Vagueness of the "case within a case" theory

The accepted and traditional procedure by which a Plaintiff in a legal malpractice case must present his evidence is known as a "suit within a suit" or "trial within a trial." (a.k.a. a "case within a case") Legal Malpractice 4th Edition, Volume 4 (1996) by Ronald Mallen and Jeffrey Smith, §32.8, p. 169. There is general agreement that he must prove four basic factors: the malpractice; that there were damages; the nature of the damages; a reasonable accounting of the damages. These standards are fair and in accordance with the burden of proof in other breach of contract or negligence actions.

The logical expectation is that the Defendant attorney

(having access to the same transcripts, evidence, and facts) would then offer his own witnesses, arguments and rebuttal. The jury would weigh the evidence and make a determination based upon the merits of each party's case.

However, the phrase, "case within a case," opens a Pandora's Box of confusion and of issues which serve only to provide a means by which Courts can unnecessarily elevate standards and unfairly obstruct a Plaintiff's efforts.

For instance, must the same opposing party and witnesses who testified at the underlying case testify at the malpractice trial? Is it necessary to confront them and get their responses to evidence which the attorney Defendant in the malpractice trial had failed to obtain or to use? If so, is it up to the malpractice Plaintiff or to the malpractice Defendant to call them? Or, is a transcript of the underlying proceeding sufficient? Although the demeanor of the witnesses cannot be observed, is a transcript superior to having witnesses provide their recollection? Does it actually provide the best record of what transpired? What if the witnesses from the underlying trial are not available? What if the evidence which the malpractice Defendant attorney did not produce or utilize is no longer available? What if his negligence is so pervasive that the only way one can attribute damages is by speculation?

Is it necessary, as most Courts have ruled, to have expert witnesses testify at the malpractice trial as to the standard of care of the Defendant attorney? Or, as other Courts have ruled, is it unfair to allow someone with the advantage of hindsight testify as to what should have been done? Does a "case within a case" require the Plaintiff to prove what the Judge or jury in the underlying case should

have done, but for the malpractice, or what the Judge or jury would have done? Does this mean the actual Judge, with his individual proclivities, or a "reasonable" Judge? Or, as argued by counsel for Mr. Gaughan, is it too speculative for "anyone" to determine.

There are almost unlimited variables of this nature that can be, and are, used to strike or dismiss on the basis that the Plaintiff failed to properly present a "case within a case."

Law books, periodicals and case law have addressed each of these issues. Most were raised in Howard v. Gaughan and decided in favor of Mr. Gaughan. As an example, lost support was the largest single claim. The jury had reviewed an exhibit from the underlying divorce which showed, with checks from Dr. Howard, that for the first full year of separation Mary Howard had received an average of almost $6,000.00/month.

Mr. Grove had reviewed for the jury the mandatory factors to be considered before setting support. They were neither lengthy nor difficult to understand. In presenting her own case, all applicable information for both Dr. Howard and Mary Howard had been discussed. Their financial statements for the divorce had been accepted as exhibits. The Howard v. Howard file was present in the courtroom. It contained Dr. Howard's seven exhibits: the practice evaluation report; an assets inventory; the Separation Agreement; an abstract of withdrawals from a money market account; his fee schedule; his 1987 tax return; and the aforementioned financial statement.

The jury had all the facts necessary to make its own determination as to what the support should have been "but for" the alleged malpractice. Furthermore, Mr. Grove was

prepared to testify as to his opinion if the Judge preferred. Instead, the entire support claim was struck. Mr. Grove's opinion was not allowed on the grounds that he should be given no more credence than other judges or attorneys who, with the same information, would still arrive at different conclusions. Mary Howard argued that made it impossible to prove damages. (4/18/96 pp. 208, line 4 - 209, line 4) The following dialogue then took place. (4/18/96 pp. 209, line 5 - 210, line 2)

> "THE COURT: Well, the other way to do it is to put all the evidence on and let the jury determine what the support level will be.
>
> THE PLAINTIFF: And that's what I was going to ask you.
>
> MR. PRIOR: We don't know what Dr. Howard --
>
> THE PLAINTIFF: We can get it right out of the files. The files have everything.
>
> THE COURT: We don't have all the exhibits. We don't have the testimony. We don't have the demeanor of the witnesses that can be observed.
>
> MR. PRIOR: We don't have Dr. Howard's answers to the questions that she wanted to ask him about these checks. We don't know what he would have said. Would he have had an answer? Would he have said, I lied, or he cheated, or would he have had a response. We don't have any of that. And that's what they need.
>
> THE PLAINTIFF: And so that means that's -- you're telling me no?
>
> THE COURT: I'm telling you no; okay?"

In Virginia there is case law holding that the legal malpractice Plaintiff must present a "case within a case," but there are no definitive guidelines for the more complex

suits. This leaves Judges and defendant attorneys free to import from other jurisdictions a literal potpourri of arbitrary rulings which then can be selectively applied to hinder the Plaintiff. Many of these rulings are shockingly biased. If the use of a "case within a case" is not eradicated on a national basis, bad attorneys will continue to enjoy immunity from their actions.

Requiring a legal malpractice Plaintiff to work within the nebulous confines of a "case within a case" produces, rather than alleviates, confusion and injustice. It is no more logical to hold him to that standard than it would be to require a Plaintiff in a negligence suit against an architect to construct a duplicate building "the right way" in order to prove his case. Unless there are statutes to the contrary, it should be presumed that those already in place are adequate for attorneys and other professionals. If the statutes are not adequate, changes should be legislated, not created by the Courts.

QUESTION III - THIS COURT'S SUPERVISION

Even the best Judges make occasional discretionary and legal errors. However, it takes an unbridled arrogance to knowingly and repeatedly trample one's Constitutional rights. For all of the reasons set forth in this Petition, the trial was a flagrant travesty and a black mark on the Judiciary. The Writ should be granted because this Court is now aware of what happened and because it has the power to correct what was a terrible, life-affecting injustice.

CONCLUSION

Plaintiffs in legal malpractice suits have already suffered financial damages in the underlying case. Often it is ruinous. In addition, they have borne the inordinate

expense of hiring one or more attorneys as expert witnesses for the malpractice trial. They rarely can afford to gamble additional thousands of dollars on an appeal. (In this metropolitan area, a transcript for just a one-day proceeding averages $1,000.00. Legal fees range from around $150.00/hour to well over $350.00/hour.) Even if they were to win an appeal, most people do not have the means to pay the costs of another trial, with experts, etc.

Fighting back is economically prohibitive for ordinary citizens, and abuses usually go unchallenged. When facing biased courts and powerful malpractice insurance carriers, they lack the clout and financial resources to combat discrimination or to inspire reasonable settlements, regardless of the nature or extent of any injustices. They are expected to quietly fade away - and they do. The status quo is preserved.

Mary Howard prays this Court will abolish the practice of directing verdicts and of striking evidence and claims once a jury trial has commenced. It is open to abuse and there are other satisfactory remedies. She further prays that this Court will take action against legal malpractice Plaintiffs being required to present a "case within a case," and that Howard v. Gaughan will be remanded for a jury to determine its merits.

RESPECTFULLY SUBMITTED
Mary E. Howard, Pro Se

By: Mary E. Howard

Mary E. Howard
8380 Greensboro Drive, Unit 118
McLean, Virginia 22102
(703) 356-2062

APPENDIX A

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

MARY E. HOWARD,

Plaintiff,

v. AT LAW NO: 132668

LAWRENCE D. GAUGHAN, et al.,

Defendants.

AMENDED JUDGMENT ORDER

This cause came to be heard on April 16, 17, 18 and 22, 1996, The Honorable Thomas Kenny, presiding.

WHEREUPON, a panel of thirteen (13) veniremen was chosen from which each side struck three after appropriate voir dire, and the remaining seven (7) were sworn to well and truly try the issues before them;

WHEREUPON, the plaintiff presented her evidence to its conclusion, at which time the defendants moved to strike the plaintiff's evidence;

WHEREUPON, the court held that the evidence for the malpractice claim was sufficient to go to the jury, as the expert testimony had established a prima facie showing there was a breach of the standard of care by Mr. Gaughan.

WHEREUPON, the court struck the evidence for the claim for emotional distress, holding it was not such that reasonable persons could conclude there was an intent to harm the plaintiff or a reckless disregard for her rights;

WHEREUPON, the court declared the plaintiff had failed to show that, but for the defendant's breach, the outcome of the case would have been different;

WHEREUPON, the court struck the plaintiff's evidence for all of her claims, having concluded that it was insufficient to send to the jury;

WHEREFORE, IT IS ORDERED THAT Judgment be, and hereby is, entered in favor of the defendants.

ENTERED this 24 day of May, 1996.

/s/ Judge Thomas Kenny
Thomas Kenny, Circuit Court Judge

SEEN AND OBJECTED TO:

/s/ Mary E. Howard
Mary E. Howard
Pro Se
8380 Greensboro Drive, Unit 118
McLean, Virginia 22102
(703) 356-2062

SEEN AND ~~AGREED TO~~ OBJECTED AS TO FORM

/s/ Francis J. Prior
Francis J. Prior, Esquire
#017188
Counsel for Defendants
Siciliano, Ellis, Dyer & Boccarosse
10521 Judicial Drive, Suite 300
Fairfax, Virginia 22030
(703) 385-6692

APPENDIX B

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

MARY E. HOWARD,

Plaintiff,

v.

LAWRENCE D. GAUGHAN, et al.,

Defendants.

AT LAW NO. 132668

FINAL ORDER

DENYING MOTION TO RECONSIDER

This cause came on plaintiff's motion to reconsider the court's ruling granting the defendants' motion to strike the plaintiff's evidence at the trial of this case, and was decided on plaintiff's written motion without argument.

Fr (sic) the reasons stated in the opinion letter dated May 21, 1996, the motion is denied.

THIS ORDER IS FINAL.

Enter: May 21, 1966 (sic)

/s/ JudgeThomas S. Kenny
Thomas S. Kenny, Judge

Endorsement of counsel waived, per Rule I:13

APPENDIX B (PAGE 2)

OPINION LETTER FROM CIRCUIT COURT JUDGE

May 21, 1996

Ms. Mary Howard
8380 Greensboro Drive/Unit 118
McLean Virginia 22102

Francis J. Prior, Esquire
Siciliano, Ellis, Dyer & Boccarosse
10521 Judicial Drive
Fairfax, Virginia 22030

Re: Mary Howard v. Lawrence D. Gaughan, et al.,
Law No. 132668

Dear Ms. Howard and Mr. Prior:

I have received and reviewed Ms. Howard's motion to reconsider my ruling granting defendants' motion to strike. For the reasons set forth below, the motion is denied.

The motion does not really address the basis for the ruling, which was that there was no competent evidence on which the jury could conclude that Mr. Gaughan's alleged negligence made any difference in the outcome of Ms. Howard's equitable distribution and support claims. She had the burden of showing what the result would be without his negligence, and the court ruled that she had completely failed to do so.

Even if I were to accept all her allegations of negligence and all the damages she claims, she has failed to connect the two with the bridge of proximate cause. Accordingly, the motion to reconsider is denied. A final order is enclosed.

Very truly yours,

/s/ Thomas S. Kenny

APPENDIX C

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday *the* 12th *day of* September, 1996.

Mary E. Howard, Appellant,

against Circuit Court No. 132668

Lawrence D. Gaughan, et al., Appellees.

From the Circuit Court of Fairfax County

Finding that the appeal was not perfected in the manner provided by law in that the filing fee was not paid, the Court rejects the petition for appeal in the above-styled case. Rule 5:17 (f)

A Copy,

Teste:

David B. Beach

Clerk

APPENDIX D

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 1st *day of* November, 1996.

Mary E. Howard, Appellant,

against Circuit Court No. 132668

Lawrence D. Gaughan, et al., Appellees.

Upon a Petition for Rehearing

On consideration of the motion of the appellant, which is treated as a petition to set aside the judgment rendered herein on the 12th day of September, 1996 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,
Teste:
David B. Beach
Clerk

APPENDIX E

MEMORANDUM FROM ADMINISTRATIVE OFFICE OF SUPREME COURT OF VIRGINIA

December 18, 1996

MEMORANDUM

TO: SUPREME COURT OF VIRGINIA

FROM: JUDICIAL COUNCIL OF VIRGINIA

SUBJECT: Proposed Amendments to Rules 5:17(f) and 5A:6(c)

The Judicial Council of Virginia recommends that the failure to transmit the $25.00 filing fee for appeals to both the Court of Appeals and Supreme Court should not be treated as a jurisdictional defect. The proposed amendments should ensure that the filing fee is received while preventing the technical waiver of otherwise viable appeals based on the failure to file the nominal fee.

Rule 5:17. Petition for Appeal.

(f) *Filing Fee* - The petition must be accompanied by a check or money order payable to the clerk of this Court for the amount required by statute. The statutory fee shall be ~~collected~~ due at the time such petition is preserved, ~~and~~ The clerk of this Court ~~shall not file a~~ may accept any petition that is not accompanied by such fee: on the condition that the fee be paid within ten days of filing.

Rule 5A:6. Notice of Appeal

(c) *Filing Fee* - A copy of the notice of appeal shall be

filed in the office of the clerk of the Court of Appeals and, except as otherwise provided by law, must be accompanied by a check or money order in the amount of $25 payable to the clerk of the Court of Appeals. The fee shall be due at the time the notice of appeal is presented. The clerk of the Court of Appeals may accept any notice of appeal that is not accompanied by such fee on the condition that the fee be paid within ten days of filing.

APPENDIX F

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday *the* 18th *day of* December 1996.

Mary E. Howard, Appellant,

against Record No. 962518

Lawrence D. Gaughan, et al., Appellees.

From the Circuit Court of Fairfax County

On December 2, 1996 came Mary E. Howard, in proper person, and filed a petition to reinstate.

On consideration whereof, the petition to reinstate is granted, the order entered herein September 12, 1996 is vacated and this matter is placed on the docket of pending cases.

A Copy,
Teste:
David B. Beach
Clerk

APPENDIX G

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday *the* 4th *day of* March, 1997.

Mary E. Howard, Appellant,

against Record No. 962518
Circuit Court No. 132668

Lawrence D. Gaughan, et al., Appellees.

From the Circuit Court of Fairfax County

Finding that the appeal was not perfected in the manner provided by law because the petition for appeal does not contain assignments of error as required by Rule 5:17(c), the Court dismisses the petition for appeal filed in the above-styled case.

A Copy,

Teste:

David B. Beach, Clerk

By: Jennifer G. Earl
Deputy Clerk

APPENDIX H

VIRGINIA

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 18th *day of* April, 1997.

Mary E. Howard, Appellant,

against Record No. 962518
Circuit Court No. 132668

Lawrence D. Gaughan, et al., Appellees.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 4th day of March, 1997 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,
Teste:
David B. Beach
Clerk

APPENDIX I

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday *the* 21st *day of* May, 1997.

Mary E. Howard, Appellant,

against Record No. 962518
Circuit Court No. 132668

Lawrence D. Gaughan, et al., Appellees.

From the Circuit Court of Fairfax County

On May 5, 1997 came the appellant, in proper person, and filed a petition to reinstate or to clarify.

On consideration whereof, the Court denies appellant's petition.

A Copy,
Teste:
David B. Beach, Clerk
By: Patricia A. Kreuger
Deputy Clerk

APPENDIX J

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

THE CONSTITUTION OF THE UNITED STATES

The Seventh Amendment: "In suits at common law, where value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

The Fourteenth Amendment provides in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

THE CONSTITUTION OF VIRGINIA
BILL OF RIGHTS
ARTICLE I

Section 6. Free elections; consent of governed. "That all elections ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed, or deprived of, or damaged in, their property for public uses, **without their own consent, or that of their representatives duly elected, or bound by any law to which they have not, in like manner, assented for the public good."** (Emphasis added)

Section 7. Laws should not be suspended. "That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people is injurious to their rights, and ought not to be exercised."

Section 11. Due process of law; obligation of contracts;

taking of private property; prohibited discrimination; jury trial in civil cases. In pertinent part: "That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred."

STATUTORY PROVISIONS

Rule 50 of the Federal Rules of Civil Procedures:

"(a) JUDGMENT AS A MATTER OF LAW

(1) If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim, counterclaim, cross-claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment."

801-378 of the Code of Virginia: "In no action tried before a jury shall the trial judge give to the jury a peremptory instruction directing what verdict the jury shall render unless the trial judge shall have granted a motion to strike the evidence of the plaintiff or defendant, in which case the judge may direct a verdict in conformity with his ruling on the motion to strike."

APPENDIX K

RAISING OF FEDERAL ISSUES

Throughout the trial, Mary Howard objected to having to present "a case within a case," to its discriminatory nature, and to its being subject to a variety of interpretations. She also objected, at the trial stage, to the Judge making decisions on factual matters that were in the province of the jury. Her objections were overruled.

FROM MOTION RE EVIDENCE AND DAMAGES 4/22/96

Nos. 3 and 5 re no statutes requiring "case within a case."

"3. In short, Virginia views legal malpractice as no more and no less than a tort (or breach of contract) which should be classified in accordance with the claims stated in the Motion for Judgment. There is no requirement that a plaintiff be held to a higher or a more difficult standard of proof of wrongdoing or proof of damages, merely because the suit is for malpractice and the Defendant is an attorney.

"5. Imposing such an impossible burden upon the plaintiffs in a legal malpractice suit is so prejudicial it would prohibit taking action against attorneys for anything but the simplest infractions, thereby exempting them from litigation involving more complex abuses. They could avoid liability merely because damages are difficult to measure.

"11. In actions for personal torts, and actions generally sounding in damages, it is the province of the jury to estimate the injury, and the court will not interfere unless there is a manifest abuse."

The motion was denied. (Continued on next page.)

FROM MOTION TO RECONSIDER - 5/16/96

"4. Mary Howard contends these damages stem directly from Mr. Gaughan's original negligence and that they are rightfully recoverable under the claims and counts set forth in her Motion for Judgment. At the very least, the circumstances are such that reasonable minds may differ. For over ninety years, it has been held that when there is doubt as to what damages should be considered as flowing, in a natural and continuous sequence, from an act of negligence, the question should be left to the jury. Winfree v. Jones, 104 Va. 39, 51 S.E. 153 (1905)

CONCLUSION

"As has been argued previously, Mary Howard contends that, without proper authority, she has been held to a higher standard and heavier burden of proof than she would have been if this were not a legal malpractice suit. She also maintains that this constitutes an arbitrary and highly prejudicial bias in favor of attorneys and the carriers of their malpractice insurance and that, as such, it violates both her state and her federal constitutional rights."

The motion was denied.

FROM PETITION FOR APPEAL TO THE SUPREME COURT OF VIRGINIA

From argument re "The trial court deprived Mary Howard of her Constitutional rights."

"For all of the reasons that have been set forth in this Petition, Mary Howard maintains she was denied her Constitutional rights. The trial court's use of a "case within a case" was contrary to the evidence, contrary to logic, and contrary to any concept of justice. By ruling on issues that

were in the province of the Jury he, in effect, denied her a Jury trial.

"The foundation of his (the Judge's) actions, the audacious "case within a case," as interpreted by Counsel for Mr. Gaughan, discriminates against Plaintiffs in legal malpractice suits, elevating the Defendant attorneys to the status of literally being above the law."
The Petition was dismissed without consideration of merits.

FROM PETITION TO REINSTATE OR TO CLARIFY TO THE SUPREME COURT OF VIRGINIA
May 2, 1997

"I. Before the Court rules on this Petition, Mary Howard wants to be sure it understands that her appeal addresses the trial court's bludgeoning of her State and Federal Constitutional rights and that this is fully documented by the transcripts and records. Even the strictest interpretation of these rights guarantees her the legal process that is specified by applicable Virginia statutes. These statutes are to be applied fairly and without prejudice. Instead, with no authority whatsoever, the trial court held her to a different, and much higher, standard of review - an absurd version of a theory created by attorneys for their own benefit. Moreover, in the face of clear and convincing evidence to the contrary, he improperly ruled on issues that were within the province of the Jury, thereby depriving her of her right to a Jury trial. Instead of applying the existing law, he used the guise of a 'case within a case' to create and legislate his own." **The**

Petition was dismissed without consideration of merits.

FROM MARY HOWARD'S PETITION FOR APPEAL TO THE SUPREME COURT OF VIRGINIA

QUESTIONS PRESENTED

1. Did the trial court err in striking Mary Howard's evidence and claims of malpractice, negligence, breach of contract, and breach of warranties and of the implied covenant of good faith and fair dealing?

2. Did the trial court err in holding that a legal malpractice suit requires the Plaintiff to present a "case within a case?"

A. If not, did he err in the standards of proof he attributed to a "case within a case?"

B. If not, exactly what constitutes a "case within a case?" What must the Plaintiff prove with respect to the malpractice and damages, and what governs how he proves it?

C. If not, does a "case within a case" discriminate against the Plaintiffs in legal malpractice suits, and does it give Defendant lawyers more protection from liability in malpractice actions than other professionals are afforded?

3. Did the trial court err in his ruling that Mary Howard had failed to show that "but for" the Defendant's breach, the outcome of the case would have been different?

4. Did the trial court err in striking Mary Howard's evidence and claims for emotional distress and exemplary damages?

5. Did the trial court deprive Mary Howard of her Constitutional rights? (Continued on next page.)

The Petition was dismissed without consideration of merits.

FROM MARY HOWARD'S PETITION FOR APPEAL TO THE SUPREME COURT OF VIRGINIA

ASSIGNMENTS OF ERROR

As set forth in 1-2 of the Questions Presented, the trial court erred in striking Mary Howard's evidence and claims for the malpractice, negligence, breach of contract, and breach of warranties. Virginia does not require the Plaintiff in a legal malpractice suit to present a "case within a case," a vague phrase that invites inconsistencies and abuse. The trial court erred in holding her to this and to the highly discriminatory burden of proof he placed upon her.

The trial court erred when he ruled that Mary Howard had failed to show that, "but for" the Defendant's breach, the outcome of the case would have been different.

The trial court erred in striking Mary Howard's evidence and claims for emotional distress/mental anguish and exemplary damages.

The trial court deprived Mary Howard of her Constitutional rights.

The Petition was dismissed without consideration of merits.